



December 18, 2001

Mr. Terrence S. Welch
Brown & Hoffmeister, LLP
1717 Main Street, Suite 4300
Dallas, Texas 75201

OR2001-5959

Dear Mr. Welch:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 156294.

The Town of Flower Mound (the "town") received a request for documentation and correspondence to, from, and concerning a named former employee of the town, and the personnel file of that individual, the town manager, and town attorney. You claim that the requested information is excepted from disclosure under sections 552.103 and 552.107 of the Government Code. We have considered the exceptions you claim and reviewed Exhibit 2, the submitted sample of information.¹

First we address your section 552.103 claim for the requested information. Section 552.103 states in pertinent part:

(a) Information is excepted from the requirements of Section 552.021 if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

¹We assume that the "sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

....

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103. A governmental body has the burden of providing relevant facts and documents to show the applicability of section 552.103 in a particular situation. The test for establishing that section 552.103(a) applies is a showing that (1) litigation is pending or reasonably anticipated on the date that the governmental body receives the request, and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479 (Tex. App.--Austin, 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 588 (1991).

You advise that the requestor filed a lawsuit in June 2001 against the town and certain town employees on behalf of the named former employee, alleging defamation and wrongful termination, among other causes of action. You have included two petitions filed in the lawsuit with your submitted documents. Based on our review of your arguments and the submitted information, we conclude that litigation was pending on September 27, 2001, the date the town received the request for information, and that some of the submitted documents relate to the pending litigation for purposes of section 552.103(a). *Texas Legal Found.*, 958 S.W.2d at 483. We have marked the unrelated documents that you must release.

Thus, you may withhold some of the requested information from the requestor under section 552.103. However, we note that a portion of this information has either been obtained from or provided to the opposing party. When the opposing party in the litigation has seen or had access to any of the information in these records, there is no section 552.103(a) interest in withholding that information from the requestor. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, you may not withhold any information originating from or directed to the opposing party, or information to which the opposing party has otherwise had access under section 552.103. As you claim no other exceptions for this material, it must be released. Because section 552.103 is dispositive, we do not address your other claimed exception. We have marked the information that you must release. You may withhold the remaining information in Exhibit 2.²

² We note that, while the town references Exhibit 2 as containing representative, responsive documentation and submits Exhibits 3-5 only as background information, these exhibits also appear to contain responsive documents. We assume the town has released these documents as you have not asked to withhold them. If not, you must do so at this time. Gov't Code §§ 552.301, .302.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for

contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in cursive script, reading "Kristen Bates". The signature is written in dark ink and is positioned above the printed name.

Kristen Bates
Assistant Attorney General
Open Records Division

KAB/seg

Ref: ID# 156294

Enc. Submitted documents

c: Mr. David J. Moraine
Crosbie & Moraine
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Denton, Texas 76201
(w/o enclosures)